United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

NOV 3 1975

75-7324

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DAVID L. SALISBURY	)	
Plaintiff - Appellant	)	CIVIL APPEAL
vs	)	DOCKET NO. 75-7324
The SOUTHERN NEW ENGLAND TELEPHONE	)	
COMPANY, INC., and WILLIAM J. O'KEEFE	)	
Defendants - Appellees	)	

B

BRIEF OF PLAINTIFF - APPELLANT

On Appeal From The United States District Court

For The District of Connecticut

DAVID L. SALISBURY

Pro Se, Plaintiff - Appellant

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TABLE OF CONTENTS

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vs

The SOUTHERN NEW ENGLAND TELEPHONE COMPANY, INC., and WILLIAM J. O'KEEFE

Defendants - Appellees

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For The District of Connecticut, Zampano, J.

BRIEF OF PLAINTIFF - APPELLANT

STATEMENT OF ISSUES

1. Did the District Court err in granting defendants' motion to dismiss upon reconsideration, plaintiff's complaint alleging deprivation of his civil rights by the defendants in violation of 42 U.S.C. § 1983, without an evidentiary hearing?

2. Did the District Court err in granting defendants' motion to dismiss upon reconsideration prior to completion of discovery and without a complete record?

3. Did the District Court err in granting defendants' motion to dismiss upon reconsideration, plaintiff's complaint alleging conspiracy by the defendants to deny plaintiff his civil rights, and failure of the defendants to prevent said conspiracies to deny plaintiff his civil rights, in violation of 42 U.S.C. §§§ 1985, 1986 and 1988, without a complete record and without an evidentiary hearing?

4. Did the District Court err in holding the Public Utilities operating in Connecticut, do not operate under color of law?

5. Did the District Court err in holding that the challanged termination procedures of the Public Utilities in Connecticut do not constitute " state action", within the purview of 42 U.S.C. § 1983 ?

STATEMENT OF THE CASE

This is an appeal from a judgment entered against the plaintiff by the Hon. Robert Zampano, Judge, District Court, District of Connecticut , dismissing this action upon defendants' motion to dismiss on reconsideration. (App., Doc No. 34 pp 1 - 2.) A copy of the decision on that motion and the judgment are reproduced in the Appendix, Documnet Nos. 36 and 37, respectively.

Plaintiff is, and has been for many years, a subscriber to telephone service provided to plaintiff by the defendant telephone company. This service was provided to the plaintiff at his residence in Watertown, Connecticut. From time to time during the past several years, plaintiff has become involved in disputes with the defendant telephone company over charges billed to him for the telephone service. Unable to secure relief from the defendant telephone company, plaintiff complained to the Public Utilities Commission for the State of Connecticut, and was advised by them to bring action against the telephone company in the Small Claims Courts for relief. In October, 1970,

plaintiff brought an action in the Circuit Court for the State of Connecticut, at Waterbury, to settle claims arising from these disputes. During the pendancy of that lawsuit, further disputes arose, which were not resolved, and plaintiff withheld payment of some of the telephone service charges. Thereafter, the defendant telephone company shut off service to the plaintiff on February 1, 1972, restoring service on February 9, 1972. On January 23, 1973, the defendant telephone company, without notice or hearing, terminated plaintiff's telephone service and thereafter refused to restore said service or to discuss the matter with the plaintiff. Unable to secure other relief, plaintiff brought the present action under the Federal Civil Rights Statutes seeking injunctive and declaratory relief as well as monetary damages.

Plaintiff's complaint alleges in the First Count, that the defendants acted in contravention of the laws of the State of Connecticut by terminating his telephone service and that their actions were done under color of law and denied plaintiff the rights, privileges and immunities secured to him by the Constitution and Laws of the United States, and in particular, those rights secured to him under the First and Fourteenth Amendments to the Constitution of the United States in violation of 42 U.S.C. § 1983. (Compl., Count I., App. Doc. No.1, pp 1 - 9)

Plaintiff alleges in the Second Count that the defendants acting separately and in concert, under color or pretense of law, conspired to deny plaintiff the rights, privileges and immunities secured to him by the laws of the State of Connecticut and the Constitution and Laws of the United States, and in particular, those rights secured to him under the First and Fourteenth Amendments to the Constitution of the United States in violation of 42 U.S.C. § 1983. (Compl. Count II., App. Doc No. 1, pp 9 - 11.)

Plaintiff alleges in the Third Count that the defendants acting separately and in concert, conspired to deny plaintiff the rights, privileges and immunities secured to him by the laws of the State of Connecticut and the Constitution and Laws of the United States, and in particular those rights secured to him under the First and Fourteenth Amendments to the Constitution of the United States, in violation of 42 U.S.C. § 1985, (2) and (3). (Compl., Count III., App. Doc. No. 1, pp. 11 - 13.)

Plaintiff alleges in the Fourth Count that the defendants acting separately and in concert, having knowledge of the aforesaid conspiracies, and having the power to prevent them, failed to take any action to prevent them, or to try and prevent them, in contravention of 42 U.S.C. § 1986. (Compl. Count IV., App. Doc. No. 1, pp. 13 - 14.)

Plaintiff in the Fifth Count seeks declaratory relief pursuant to the provisions of 28 U.S.C. §§ 2201, 2202. (Compl., Count V., App. Doc. No. 1, pp. 14 - 18.)

Jurisdiction for this action is authorized by 28 U.S.C. § 1343. (Compl., Count I., ¶1, App. Doc. No. 1, p. 1.)

On or about June 18, 1973, the defendants filed with the District Court a motion to dismiss the complaint. (Motion to Dismiss, App. Doc. No. 5,pp 1-3). On November 8, 1973, the District Court held that the plaintiff had made sufficient showing that the defendants in their actions had acted under color of law, and denied the defendants' motion to dismiss. (Ruling on Motion to Dismiss, App. Doc. No. 12, pp 1 - 6.) Salisbury vs Southern New England Telephone Company, 365 F. Supp. 1023.

Thereafter, after various proceedings not relevant to the determination of this appeal, the defendants, pursuant to leave granted to them by Judge Zampano on February 10, 1975, filed their motion to dismiss upon reconsideration. (Motion to Dismiss Upon Reconsideration, App. Doc. No. 34, pp. 1 - 2)

The District Court, on April 21, 1975, without an evidentiary hearing, or even oral argument, and prior to completion of discovery, applying the guidelines set forth in Jackson vs Metropolitan Edison Company, 419 U.S., 435, ruled that the actions by the defendants in terminating plaintiff's telephone service did not constitute state action under 42 U.S.C.§ 1983, and granted defendants' motion to dismiss on reconsideration. The District Court further, sua sponte, without any evidentiary hearing, and without any evidence to go on, prior to the completion of discovery, and without even an opportunity for oral argument, dismissed all other counts of this complaint. (Ruling on Motion to Dismiss Upon Reconsideration, App. Doc. No. 36, pp. 1 - 6)

On April 25, 1975, the District Court entered judgment against the plaintiff dismissing this action. (Judgment, App. Doc. No. 37, p. 1.)

On May 21, 1975, plaintiff filed notice of appeal, pro se. (Notice of Appeal, App. Doc. No. 38, p. 1.)

Plaintiff maintains that the District Court erred in dismissing the complaint without an evidentiary hearing on all counts, and prior to completion of discovery, and further, that the District Court erred in holding that the Connecticut Utilities do not operate under color of law, and in holding that the challanged termination procedures do not constitute state action within the purview of 42 U.S.C. § 1983. Plaintiff further maintains that the District Court erred in holding that the complaint does not state a claim upon which relief can be granted under 42 U.S.C. §§ 1985 and 1986.

ARGUMENT

I

THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT WITHOUT AN EVIDENTIARY HEARING AND PRIOR TO COMPLETION OF DISCOVERY.

A. The Material Allegations Of The Complaint Are Taken As Admitted.

This action alleges, inter alia, that the defendants, acting under color of law, terminated plaintiff's telephone service, and thereby deprived him of the rights, privileges and immunities guaranteed to him by the laws of the State of Connecticut, and the Constitution and Laws of the United States, and in particular, those rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States. (Compl., App. Doc. No. 1, each count, pp 1 - 15.) Jurisdiction is predicated on 28 U.S.C. § 1343, (Compl., App. Document No. 1, p, 1,¶ 1), which provides:

§ 1343 Civil Rights and elective franchise

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 ;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent ;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States :
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Thus the federal subject matter jurisdiction created by § 1343 extends to all citizens of the United States who have suffered injury to person or property in furtherance of any conspiracy mentioned in 42 U.S.C. § 1985. Also, jurisdiction extends to recover damages from any person who fails to prevent any wrongs mentioned in § 1985, which he had knowledge were about to occur and power to prevent. See 42 U.S.C. § 1986. Further, jurisdiction extends to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States of by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. See 42 U.S.C. § 1983. Finally jurisdiction extends to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights. Such relief is sought in this action in the Fifth Count for a declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202. (Compl., App. Doc No. 1, Count V, p. 15, ¶ 4.)

Therefore, the District Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1343, (1), (2), (3), (4), over all claims in this case.

A careful reading of the complaint in the case at bar shows beyond any doubt that the plaintiffs numerous material allegations in each and every count, if proven at a trial on the merits, entitle him to the relief sought.

The Hon. Justice Marshall, speaking for the Supreme Court in the case of Jenkins vs McKeithen, 395 U.S., 411, 23 L Ed2d 404, 89 S. Ct. 1843 (1969), held;

> (5) For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted.
>
> (6) For purposes of a motin to dismiss, the complaint is to be liberally construed in favor of the plaintiff.

B. On Motion To Dismiss, Plaintiff's Allegations Are Required To Be Taken As True.

On a motion to dismiss a complaint, the facts alleged therein must be presumed to be true. Hoffman vs Halden, 268 Fed 2d, 280, 283. On appeal from dismissal of complaint on grounds that it failed to state a claim upon which relief could be granted, Court of Appeals was required to accept plaintiff's allegations as true. Lee vs Hodges, 321 Fed 2d, 480. (CCA 4,1963) L'Orange vs Medical Protective Co., 394 Fed 2d, 57, 59. (CCA 6)

Plaintiff's complaint, Counts I and II, rest on 42 U.S.C. § 1983, (Compl., App. Doc. No. 1, pp. 1 - 11.), which provides:

§ 1983 Civil Action For Deprivation Of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Thus, the issue at bar in plaintiff's first two counts is whether the facts alleged, if proven true, state a claim upon which relief can be granted. If the plaintiff alleges that the defendants acted under color or pretense of law, including statutes, ordinances, regulations, customs, or usages, and alleges sufficient facts to support his claims, which if proven true, would entitle him to relief, his complaint should not be dismissed. Again, a careful reading of the complaint, (Compl., App. Doc No. 1, Counts I and II, pp 1 - 11.) will show beyond any question that the facts requisite for a showing of color of law, within applicable case law, are amply alleged. Since for the purposes of a motion to dismiss, they must be assumed to be true, it is respectfully submitted that the District Court erred in dismissing the complaint at this time.

C. A Complaint Should Not Be Dismissed For Failure To State A Claim Unless It Appears beyond Doubt That The Plaintiff Can Prove No Set Of Facts In Support Of His Claim Which Would Entitle Him To Relief.

In the case at bar, plaintiff has alleged numerous facts, in each of the five counts of the complaint, which admitted, and assumed to be true for the purposes of the motion to dismiss, entitle him to relief when proven. Thus, essentially the basic issue before this Court, is whether the District Court erred in dismissing this complaint without allowing plaintiff to present evidence on his claims.

The District Court states for example, that there is no evidence before the Court that the Connecticut Public Utilities Commission has played a role in the plaintiff's alleged determination. (Ruling on Defendants' Motion To Dismiss Upon Reconsideration, App. Doc. No. 36, p. 5.) While it is true that there is no evidence to support this at the present time before the Court, that does not mean that such evidence does not exist, nor that the plaintiff can not support his claim at a hearing on the merits. Indeed, with respect to the District Court, the District Court has prevented plaintiff from presenting his proof by dismissing the action prior to an evidentiary hearing, and therefore, should not use this lack of evidence against plaintiff. On a motion to dismiss for failure to state a claim, the complaint stands on the allegations contained therein. Evidentiary considerations are not brought into play by defendants' motions to dismiss complaint on ground that court lacks jurisdiction of subject matter of action, and on ground that complaint fails to state claim on which relief can be granted. Westlab, Inc., vs Freedomland, Inc., 198 F. Supp. 701. (D.C.S.D.N.Y. - 1961) F.R.C.P. 12 (b).

Nor are the factual allegations of defendants' brief to be accepted for purpose of a motion to dismiss. Mabra vs Schmidt, 356 F. Supp., 620.

The complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Haines vs Kerner, 404 U.S., 519; 30 L. Ed 2d 652; 92 S. Ct., 594; 2 A Moore, Federal Practice, 2d Ed. ¶ 2.08; Conley vs Gibson, 355 U.S., 41, 45 - 46; 2 L. Ed 2d 80; 78 S. Ct. 99.; Lee vs Hodges, Supra; Commerce Oil Refining Corporation vs Miner, 22 F.R.D. 5, 6, 9 - 10. (D.C.R.I. 1958) .

A complaint is sufficient if there are enough facts to indicate that plaintiff has a claim under any cognizable legal theory. G.C.S., Inc. vs David W. Murray Co., 45 F.R.D. 8, (D.C.PA. 1968).

The complaint should be viewed in the light most favorable to the pleader. Azar vs Conley, 456 Fed 2d, 1382, (CCA 6 Ohio- 1972); Scheuer vs Rhodes, 416 U.S., 232; 40 L Ed 2d, 90; 94 S. Ct. 1683: Jenkins vs McKeithen, Supra, 23 L Ed 2d at page 408.

On motion to dismiss for failure to state cause of action, plaintiff, especially one appearing pro se, is entitled to all reasonable presumptions. Lee Vs. Hodges, Supra; Haines vs Kerner, Supra.

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims; this is so even though it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test. Scheuer vs Rhodes,Supra, 40 L Ed 2d, at 92. See also, Haines vs Kerner, Supra.

On a motion to dismiss a pleading for failure to state a claim upon which relief could be granted, it is not for the court to speculate as to the nature or weight of the evidence which the parties may produce at trial. F.R.C.P., Rule 8, 28 U.S.C.A., Commerce Oil Refining Corporation vs Miner, Supra.

Fact that dismissed action is brought under civil rights statute requires reviewing courts to scrutinize such dismissal with care. Azar v. Conley, Supra. Jenkins vs McKeithen, Supra, 23 L Ed 2d at p. 412. (2).

D. Plaintiff's Complaint States A Cause Of Action Under 42 U.S.C.§§ 1985,1986.

The District Court, sua sponte, dismissed plaintiff's claims under §§ 1985 and 1986, holding that the complaint fails to allege intentional or purposeful discrimination designed to favor one individual or class over another as required by the holdings in Griffin vs Breckinridge, 403 U.S., 88, 102, (1971). Plaintiff respectfully disagrees. Plaintiff does concede that if he fails in § 1985, he must likewise fail in § 1986. Plaintiff further concedes that §1988 alone does not create an independent cause of action. (See Ruling on Defendants' Motion to Reconsider Motion to Dismiss, App Doc. No. 36, p. 2.)

Plaintiff in his complaint alleges that the defendants acting separately and in concert deprived him of his rights, privileges and immunities secured to him by the provisions of the Fourteenth Amendment to the Constituion of the United States. Plaintiff further alleges that the defendants acting separately and in concert did the acts set forth, to wit: terminate his telephone service, to deny and deprive him of the rights, privileges and immunities of the Fourteenth Amendment, and further, it is alleged that the termination by the defendants as aforesaid acting separately and in concert denied him the equal protection and equal privileges and immunities clauses of the

Constitution of the United States. (Compl., App. Doc No. 1, Count II, pp 9 - 11.)

Plaintiff respectfully submits that this language meets the test as set forth in such cases as Meredith vs Allen County War Memorial Hospital Com'n, 397 Fed 2d, 33, (CCA 6 , 1968); and Bimbaum vs Trussell, 371 Fed 2d, 672, (CCA 2, 1966).

Griffin vs Breckenridge, Supra, sets aside the narrow, restrictive element of requiring an allegation to discriminate, formerly required in Hoffman vs Halden, 268 Fed 2d, 280, 283.

Griffin makes it clear that there is no need to allege or prove a specific intent in conspiracy actions, but there must be a showing of an "invidiously discriminatory animus", that is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action". In the complaint, (Compl., App. Doc. No. 1, ¶¶ 9 & 10, pp. 4 -5, and realleged in each succeeding count), plaintiff alleges that he is a member of a class, i.e., part of the group of citizens, customers of the defendant company, who have been subject to a pattern of conduct of having their telephone service terminated without notice or hearing, that there is no justification for this conduct, and that this conduct denies and deprives the class of the rights, privileges and immunities secured to them under the Constitution of the United States. Further, in ¶19, (Compl., App. Doc. No. 1, p. 10, and Count III, p 11) allege that the defendant, acting separately and in concert, actrd knowingly, wilfully, purposefully and with the specific intent ... to deny plaintiff the rights, privileges and immunities secured to plaintiff by the Constitution and laws of the United States.

It is crystal clear that these allegations meet the requirements of a showing of invidious discriminatory animus on the part of the defendants to deny the plaintiff and his class the privileges, rights and immunities guaranteed to them under the Constitution of the United States, and further, that these allegations entitle the plaintiff to offer proof at a trial on the merits and should not be disposed of on a motion to dismiss.

The Third Count, (Compl. Doc. No.1, Count III, pp. 11 - 13.), alleges that the defendants conspired and agreed to do the acts complained of herein before, to wit; terminating telephone service, and without notice, and without any hearing, or provision for any hearing, for refusing to discuss the matter with plaintiff, or to inform him of the reasons for their actions, and for refusing to restore plaintiff's telephone service, and for filing improper and dilatory pleadings in a State Court action with the purpose of impeding, obstructing and defeating the due course of justice, and that all of these acts were done to deny and deprive plaintiff of the rights, privileges and immunities secured to him by the Constitution of the United States, and that further, these acts denied and deprived plaintiff of the equal protection of the laws, and the equal privileges and equal immunities clauses of the Fourteenth Amendment to the Constitution of the United States. Further, the plaintiff alleges, in ¶¶ 9 & 10 of the First Count. (Compl., App. Doc. No 1, pp. 4 - 5), which is realleged in the subsequent counts, that he is a member of a class that has been denied these rights by having their telephone service terminated. Can it seriously be argued now, that these allegations do not entitle plaintiff to his day in court, to prove these claims?

In what other way can plaintiff plead conspiracy? See Hoffman, Supra. Certainly he is not required to list the place and date of defendants' meetings and the summary of their conversations. He is not required here to plead his

evidence. See Hoffman, Supra, at pp. 294, 295. In paragraphs 18 and 19 of the Third Count, (Compl., App. Doc. No. 1, Count III, p. 11.), this plaintiff alleges that the defendants, acting separately and in concert, acted wilfully, knowingly and purposefully and with the specific intent to deny and deprive plaintiff the rights, privileges and immunities secured to him by the Constitution and Laws of the United States. Plaintiff further alleges that the defendants, acting separately and in concert havehindered, obstructed, and delayed plaintiff further in the prosecution of said lawsuit, by divers additional illegal and improper acts, to wit: filing improper and sham and dilatory pleadings with the purpose of impeding or defeating the due course of justice and to deny and deprive plaintiff the equal protection of the laws, and to deny and deprive plaintiff of the rights secured to plaintiff by the Constitution and Laws of the United States.

It is patent that these allegations, if proven, entitle plaintiff to relief. These are factual allegations, that go far beyond mere conclusionary allegations. They state a cause of action under 42 U.S.C.§ 1985, (2) and (3) See Mullarkey vs Borglum, 323 F. Supp., 1218, 1224. (D.C.S.D.N.Y. 1970),

The allegations setting forth facts that plaintiff's telephone service was terminated, and other related acts, and hindering and obstructing him in the prosecution of his lawsuit, and that plaintiff is a member of a class, to wit;, other customers of the defendant company, who have been so treated, and that by so doing, the defendants have denied and deprived plaintiff and members of his class the equal protection of the laws, and the equal rights and equal privileges and immunities of the Fourteenth Amendment to the Constitution of the United States, clearly states a cause of action under 42 U.S.C. § 1985, (2) and (3). See Griffin vs Breckenridge, Supra,; Azar vs

Conley, Supra; Cameron vs Brock, 473 Fed 2d, 608, 610, (CCA 6, 1973); and Richardson vs Miller, 446 Fed 2d, 1247, (CCA 3, 1971).

It should be noted here, that in none of the sections of 42 U.S.C. §§§§, 1983, 1985, (2), (3), 1986 or 1988, is the word "discrimination" employed. Nor is it used in 28 U.S.C. § 1343. Plaintiff respectfully submits that the statutory language of these sections of the Civil Rights Act of 1871 must be given the full meaning and sweep that their origins and their language dictate. Lynch vs Household Finance Co., 405 U.S., 538, 549; 92 S. Ct. 1113; 31 L Ed2d, 424.

E. Even If Complaint Did Not Detail Facts, It Would Be Sufficient Under Present Federal Rules Of Procedure.

Plaintiff respectfully submits that the complaint, viewed in its entirety, alleges far more than the intendment of the present rules which hold that only a short, concise statement of the claim be made, showing that the pleader is entitled to relief. Fact pleading, per se, has not been incorporated into the present rules of pleading. All pleadings shall be construed to do substantial justice. The Civil Rights Statutes should be accorded a sweep as broad as their language, Griffin vs Breckenridge, Supra. Statutes should be interpreted with sufficient liberality to fulfill purpose of providing federal remedy in federal court in protection of federal right. Birnbaum vs Trussell, 371 Fed 2d, 672, 676, CCA 2, 1966).

The Hon. Justice Black, speaking for a unanimous Court, in Conley vs Gibson, Supra, 2 L Ed2d at p. 82 held, (10):

> " The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim but require only a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

With respect to the District Court, it is not clear whether the Court felt that plaintiff could not possible prove any set of facts that would entitle him to relief, or whether the complaint did not set forth enough facts, or set forth conclusory allegations. If somehow, there are not sufficient facts to give notice to the defendants of what the claim is, then a motion for more definite statement could have been made. Conclusory pleadings are allowed under the rules. See Chiaffitelli vs Dectmer Hospital, Inc., 437 Fed 2d, 429, 431, CCA 6, 1971).

Plaintiff submits that the allegations of the complaint more than meet the tests of the rules, and give the defendants fair and ample notice of plaintiff's claim, and that the District Court erred in dismissing these claims without a full hearing.

F. The Complaint Should Not Have Been Dismissed Prior To The Completion Of Discovery.

Briefly, plaintiff contends that if all discovery had been completed prior to dismissal, while the District Court should not take into consideration any evidence gathered as a result in considering the motion to dismiss, (See this Brief, p. 9, ¶ 2, bottom of page,) the evidence gleaned from the discovery process could enable plaintiff to amend his pleadings if and where necessary to more effectively resist the motion to dismiss, and to make easier his burden of proof. The purpose of discovery is to narrow the issues, to obtain evidence for use at trial and to secure the existence of evidence that may be used at trial. Fed Rules Civ. Proc., rules 1, 26 (b), 28 U.S.C.A., Berry vs Haynes, 41 F.R.D. 243 (1966).

The District Court should not force the parties to sacrifice their right to fully present the available evidence. See Dillon vs Bay City Const. Co., Inc., 512 Fed 2d, 801, at p. 804 (1) and cases cited therein. (CCA 5, 1975)

Plaintiff respectfully submitts that the District Court erred in dismissing this action prior to the completion of discovery.

ARGUMENT

II

THE DEFENDANT TELEPHONE COMPANY, LIKE MOST OTHER PUBLIC UTILITY COMPANIES OPERATING WITHIN THE STATE OF CONNECTICUT, CONDUCTS ITS DAILY OPERATIONS, AND IN PARTICULAR, ITS TERMINATION PROCEDURES UNDER COLOR OF LAW.

A. Plaintiff's Complaint Alleges That The Defendants Acted Under The Color Or Pretense Of Law.

The thrust of the District Court's ruling to dismiss upon reconsideration, was that the plaintiff had not made any showing that the defendants operated under color of law, either in their daily operations, or in the challanged termination procedures. The law is too well settled that 42 U.S.C.§ 1983 requires action done under color of law, to require citation here. Prior to Jackson vs Metropolitan Edison Co., Supra, several Courts held that public utilities operated under color of law. See Ihrke vs The Northern States Power Co., 459 Fed 2d, 566, (CCA 8, 1972); Palmer vs Columbia Gas of Ohio, Inc., 479 Fed 2d, 153, (CCA 6, 1973); Bronson vs Consolidated Edison Co. of N.Y., 350 F. Supp., 443, (S.D.N.Y. 1972); Hattell vs Public Service Company of Colorado, 350 F. Supp., 240, (D. Colo, 1972); Stanford vs Gas Service Company of Kansas , 346 F. Supp., 717,(D.C. Kansas, 1972).

Also, Limuel vs Southern Union Gas Co., 378 F. Supp., 964, 966, (W.D.Texas 1974), and Salisbury vs Southern New England Telephone Co., Inc., Supra.

In each of these cases, these Courts foulnd that the defendants acted under color of law in their respective states.

If we examine plaintiff's complaint on this issue, (Compl. App. Doc No.1, Count 1, ¶¶6 - 8, pp. 4 - 6), we will find allegations of the factors which have been cited in the foregoing decisions, as well as in Jackson, that are required to show the nexus of state involvement with the operations of privately owned public utilities, to characterize those operations as state action or color of law.

In ¶ 5, the Charter of the defendant company is cited, which in effect gives the defendant company its exclusive and monopolizing status. A copy of this charter can be found in 9 Special Acts 605, 4-19-82, pf the Special Acts of the Connecticut Legislature.

In ¶ 6, of the complaint, plaintiff alleges that the defendant company operates its affairs pursuant to an extensive and comprehensive statutory and regulatory scheme . . . Title 16 of the General Statutes of the State of Connecticut, as well as the pertinent Administrative Regulations of the State Public Utilities Commission, which are promulgated thereunder, all of which may be judicially noted by this Court.

In ¶ 8, plaintiff alleges that the defendant company has special permission to use public highways. This permission can be found in 10 Special Acts, 837, 3-19-89, of the Special Acts of the Connecticut Legislature. Said paragraph further alleges the many ways the defendant company is regulated, such as governing all aspects of its fare structures.

Of crucial importance is the allegation that, pursuant to C.G.S. 16-49, the P.U.C. shall apportion and assess 56 % of the expenses of the Commission, among public utilities. An examination of plaintiff's affidavit, (Plaintiff's Affidavit on Utility Assessments by the Public Utilities Commission, App. Doc. No. 35, pp 1 - 4) shows the extent of this contribution by the defendant company, and which, if introduced at trial, would certainly prove plaintiff's claim that Connecticut Public Utilities, and in particular, the defendant company operate under color of law.

Taken together, as true and admitted which is required to be done, the facts stated state a claim upon which relief can be granted, and entitle the plaintiff to a trial on the merits to prove his claim.

B. The Guidelines Set Forth In The Jackson Case Are Not Applicable To The Case At Bar.

Briefly stated, Justice Rehnquist, writing for the majority on a divided Court in Jackson vs Metropolitan Edison Co., Supra, 43 U.S.L.W. at p. 4114, stated:

> "We also find absent in the instant case the symbiotic relationship presented in Burton vs Wilmington Parking Authority, 365 U.S. 715 (1961). There where a private lessee, who practiced racial discrimination, leased space for a resturant from a state parking authority in a publicly owned building, the Court held that the State has so far insinuated itself into a position of interdepedence with the resturant that it was a joint participant in the enterprise. Id., at 725. We cautioned, however, that "while a multitude of relationships might appear to some to fall within the Amendment's embrace," differences in circumstances beget differences in law, limiting the actual holding to lessees of public property. Id., at 726.

In the instant matter, the District Court speculates that because the Supreme Court did not find that a symbiotic relationship existed in Jackson, where it was not even alluded to, that somehow plaintiff fails to allege it in this action and even if it is sufficiently alleged, it would be impossible under any circumstances for the plaintiff to prove any set of facts in support of his claim. Inasmuch as the District Court raises some of the issues on its own for the first time, certainly plaintiff should be given the opportunity to present his evidence on the issues at a trial on the merits.

The District Court states that Pennsylvania has a statute similar to Conn. Gen. Stat. § 16-49, providing for the regulatory expenses upon public utilities. While it is true that such a statute does exist, (Penn. Stat. 66-§1461) it is only similar in some respects, and different in others. The statute in effect at the time of Mrs. Jackson's termination, differs from the one in effect today, being amended shortly after her cause of action arose. We have nothing before us on the Jackson case to show that this issue was even raised or considered by the Supreme Court. We have no facts or evidence whatever that Metropolitan Edison Company pays anything to the Pennsylvania Utilities Commission, or that if it did, that it was considered by the Supreme Court in their decision. If the District Court had any such information other than the fact that Pennsylavania has a statute that authorizes some assessments for some expenses subject to some restrictions, it does not appear on the record, and should not be considered on the motion to dismiss upon reconsideration. For the purposes of the motion to dismiss, only the allegations of the complaint should be considered, and if the plaintiff can possible prove any set of facts to support his claim, the motion to dismiss should be denied. Haines vs Kerner, Supra.

The most reasonable conclusion that should be drawn from the Court's failure to find a symbiotic relationship present in Jackson, is simply under the circumstances presented in that case, none exists. (Emphasis added.) If the plaintiff is allowed to present evidence on the subject in the case at bar, it may very well be that it will be shown that Metropolitan Edison has no symbiotic relationship with the State of Pennsylvania. By no stretch of the imagination does that mean that such a relationship does not exist at the case at bar. Certainly, plaintiff is entitle to offer proof on this point. Since the District Court dismissed this action basically on this point, and since it raises the Pennsylvania Statute on its own motion for the first time, plaintiff is entitled to offer proof on this point. Plaintiff submits that the District Court erred in dismissing on this point.

C. A Sifting Of Facts Is Required To Make A Determination Concerning The Presence Of State Action.

As Mr. Justice Clark stated in Burton vs Wilmington Parking Authority, Supra, at p. 722, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance". And Id., at p. 726, "Differences in circumstances beget appropriate differences in law".

Plaintiff respectfully submits that if all of the facts relevant to this case were available, and were presented to the District Court on a trial on the merits, plaintiff would be entitled to the relief sought. However, for the purposes of the motion to dismiss, the facts were not available, and since discovery is not yet complete, some of the facts still are not

available to any of the parties, and therefore, the motion to dismiss was inappropriate. It was impossible for the District Court to sift the facts, as the Court was required to do by Burton, because the facts were not there to sift.

It may very well be that the plaintiff can show by the presentation of competent evidence, either by deposition or testimony from officials of the State Public Utility, that there is a deep financial interdependence between the defendant company and the Commission. Since the statute provides that 56% of the expenses of the Commission are paid by the utilities, and considering the size of the defendant company, the Court could take judicial notice of the fact that the contribution of the defendant company must certainly be substantial, the plaintiff is entitled to the presumption that state action does exist. Since all expenses of the Commission are taken into consideration in determining the apportionment, including wages, salaries, lights, heat, phone service, can it be said with assurance that the plaintiff could not possibly prove any set of facts at a trial on the merits that would support his claim of state action.

It is submitted that the District Court erred in dismissing this action without sifting all of the facts.

D. The State Is A Joint Participant In The Challanged Termination Procedures.

It has been held that "As long as a defendant who abridges a plaintiff's constitutional rightsacts pursuant to a state or local law which empowers him to commit the wrongful act, an action under the Federal Civil Rights Statute is established". Laverne vs Corning, 316 F. Supp., 629, (1970).

There can be no question here that the defendants company relies to

a considerable degree on the State regulations and laws empowering them to terminate telephone service, the plaintiff is entitled to offer proof that the involvment with the utility's termination procedures by the State is of such extent that a finding of state actionis required. The District Court erred in holding, in effect, that the plaintiff could not, under any set of circumstances, prove any set of facts to support this claim. While all of the facts available to the District Court to sift at the time of the ruling on the motion to dismiss upon reconsideration might, or might not, justify a finding of state action, the Court was bound by the allegations of the complaint. See Dale vs Hahn, 440 Fed 2d, 633, 634, 638, (CCA 2, 1971). It was error to decide this question on a motion to dismiss.

Although none of the factors necessary to be present for a finding of state action would, by themselves, be sufficient to constitute state action, some or all of them could require such a finding. See factors listed by Judge Kerner in Kadlec vs Illinois Bell Tel. Co., 407 Fed 2d, 624, 628, (CCA 7, 1969). These factors include extensive and comprehensive regulation, monoply status, essential public service, or traditional State function, State approval, encouragement and joint venture. In Jackson most of these factors were present to some degree, except that the Court found that no symbiotic relationship existed, perhaps because none did exist.

Here, the District Court states that there is no evidence here that any of these conditions prevail here. (Ruling on Motion to Dismiss Upon Reconsideration. App. Doc. No. 36, pp 4,5.) Since the District Court has not allowed the production of any evidence on these points, can it say with assurance that the plaintiff can prove no set of facts to support his claims.

It is respectfully submitted that the evidence necessary to prove the existence of state action is present and available by normal discovery means, that would enable plaintiff to prove that the defendant company carries out its normal daily operations, and in particular, the challanged terminations procedures under color of law. Further, there is evidence availa[illegible] by affidavit and/or deposition that could show why the Supreme Court found no symbiotic relationship in Ja[illegible]a. It is submitted that the District Court erred in not allowing plaintiff to secure and present that evidence in support of his claims.

E. Plaintiff Is Entitled To A Full Evidentiary Hearing On The Merits.

It is patent that here, the plaintiff has been denied any opportunity to prove his claims. These are claims that present important constitutional issues in the State of Connecticut. They should not be decided on a motion to dismiss. What constitutes state action is a matter to be determined after a full evidentiary hearing. Counts vs Voorhees College, 439 Fed2d,723. See Haines vs Kerner, Supra; Scheuer vs Rhodes, Supra.

CONCLUSION

For the reasons submitted herein, the decision of the District Court should be reversed, and the case remanded for further proceedings, including the completion of discovery and a full evidentiary hearing.

Respectfully submitted.

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